



**Republic v Ruanda (Criminal Appeal E066 of 2023)
[2024] KEHC 2126 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E066 OF 2023
EM MURIITHI, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

DAVID GUANTAI RUANDA RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. D.
A. Ocharo SRM in Nkubu Cr. No. 561 of 2015 delivered on 21/4/2016)*

JUDGMENT

1. After a protracted search of the original trial court file, the Record of Appeal in this case was availed to the DPP and the Respondent on 26/9/2023 and hearing set for 1/11/2023 with directions that parties file written submissions before then. The respondent did not file submissions on four occasions for that purpose on 1/11/2023, 8/11/2023, 13/12/2023 and 20/12/2023 when last adjournment for the defence was given and hearing set for 25/1/2024. The delay culminated in the withdrawal of counsel for the Respondent on 13/12/2023. The Respondent did not attend the hearing of the appeal or file any written submission.

The appeal

2. The Respondent herein, David Guantai Ruanda was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 18/9/2012 at around 1600 hours in Imenti Central district within Meru County, he intentionally caused his penis to penetrate the vagina of P.K a girl aged 12 years old. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. It was alleged that on the same date and place, he intentionally touched the vagina of P.K a child aged 12 years old. He denied the charges but upon full trial, he was acquitted under section 215 of the Criminal Procedure Code.



The Appeal

3. On appeal, the appellant DPP raised 3 grounds of appeal as follows:
 1. The learned trial Magistrate erred in law and fact by failing to consider the ingredients of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#).
 2. The learned trial Magistrate erred in law and fact by relying on the wrong proceedings to acquit the respondent.
 3. The judgment of the trial court was against the weight of the evidence adduced.

Duty of Appellant Court

4. The duty of this court as the first appellate court was set out in *Okeno v R* [1972] EA 32 as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala v Republic* [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Evidence

5. PW1 P.K and the complainant herein, gave sworn testimony that, “I am 10 years old. I do go [Particulars Withheld] in class 2. I know that today is 10/7/2014. I do recall on the 18/9/2012 at around 5pm, I had come from school. I removed my uniform and went to the toilet. At the time I was coming out was called by Guantai to go for bananas. I went to his house alone. He grabbed me and closed my mouth using a handkerchief. He took me to his bed. He removed my pant. He inserted his urinating organ into my vagina. He started to sleep on me. I felt pain. I started crying. Mama J who was outside started calling him from the door. He responded and was asked to leave. Mama J came and removed the handkerchief. I went outside the house. We went to the house of Mama N together with mama J and K, plus K. K was sent by mama N to go and buy jik. The jik was bought at mama Kendi’s shop. K gave the jik to K. I was made to bath in the jik solution together with Ann. I left after being bathed in jik solution. I went back to the house and slept. My mother came back and I was escorted to the police. I bled at the time, Guantai was on top of me. I was first taken to Cottolengo but was not examined. The following day went to Meru General Hospital. I have treatment notes and P3 form which bears my name. I do pray to mark as MFI-1 and 2. I knew accused as we were staying in one residential plot but not currently.”
6. On cross examination, she stated that “It was at 5pm after I had come from school. I was alone at the time he called me. Yes, he was alone and closed down his door. No one entered. It was a school day and was coming from school. Yes, we were staying with Guantai in one plot. It was the first time, he called me to give me bananas. I did not stay for long in his house. He was called by mama J, K and mama N. I don’t how they came to know but I cried though he had closed my mouth. Yes, he opened the door, and was informed to go. He dressed up after being called. I also searched for my clothes before leaving with those mothers. I did not have blood stained clothes as he removed them. I had my clothes cleaned by Kangai at the time I was being cleaned. I went to change to other clothes from our house. It was the



1st time, accused was doing that to me. I had been defiled by Peter Baithumbi earlier than that date and no one else. Yes, I have lodged a case against Peter at Nkubu. He had found me at the scream. I was in nursery school. I went to class 1 later on. Yes, I was studying at Ripples International in class 2. I was not chased away because of my bad behaviors as alleged. It is not true that I was not going to school and that was the reason for my discharge from school. I was not given any money by Guantai. Yes, I recorded my statement with the police. It is not true that I informed the police that accused gave me Ksh. 65/-. Yes, I know K, but she did not enter into that house. No, she was not together with those women. Kamwari also alleged to have been defiled by the same accused. No, she was not with me in the house of the accused. She did not do anything else but removed all my clothes. In the other case, I was the only witness. Accused in that case was acquitted. It is not true that this case was fabricated by my mother. Yes, he penetrated me and I bled. I was walking with difficulties, even at the hospital. The following day I could walk slowly. The doctor was able to examine me. I found K standing outside together with K, but she did not see the incident. It is not true that I had reported a teacher to the area chief over the same incident. The teacher was a woman. JG is also named Maman N. AN is also called K and I was not with him. She was also bathed together with me.”

7. PW2 Margaret Kinya testified that, “I am a resident of Chaaria Kamung’uru. I am a casual labourer. I do recall on the 8/9/2012, I had gone to Kanyua near Mitunguu. I went home at around 7.30pm I went to another shop owned by Kajuju. I had gone to buy rice. I went back to the house. I was chased down by Kajuju who asked me to go to her cousin Kangai to tell me what happened in the plot. She did not tell me anything. I went to Kangai and her husband Gitonga inside their house. K started laughing upon seeing me. I asked her husband to stop her from laughing at me, as I was not dirty. I went away without talking to her. I found PW1 sitting outside the house. I asked her what was wrong with her. She informed me that accused called her while she had gone to the toilet. The toilet is close to the house where accused resides. He enticed her with bananas. He grabbed her into his house before taking her to his bed. He had her mouth covered with a handkerchief. He inserted his private into the private part of my daughter. I took PW1 to Chaaria Police base. I was sent by police to go back and collect all the items used. I was lucky to get the jik which I took the police PW1 was taken to the Cottolengo hospital. I was sent to Meru hospital as the case was confirmed by the doctor from Cottolengo. I took her to Meru hospital the following day. I was later issued with a P3 form which was filled. Yes, I was issued with treatment notes herein and the P3 form. I did not check the private parts of the complainant as I was annoyed at the time.”
8. On cross examination, she stated that, “I went back home at 7.30pm. I found the complainant outside the house where we cook. She had not gone to school as the same had been closed. I had left her food for lunch. I have 3 children. She was the only one left in the house. She did not inform me of the time of the incident. I went to the police together with the complainant. She was walking with difficulties. I did not check her private parts. She was still bleeding from her private parts. Her clothes had blood which were taken to Cottolengo. Her pant had blood. I was shown by the doctor. Yes, my daughter was studying at [Particulars Withheld] International. She was accused of sleeping in the class room. They were not ready to stay with her. It was the second incident to the complainant of that nature. There is not other time I settled this case outside court. The brother of the accused wanted us to settle this case. I did not witness the incident. I did not check the private parts until the doctor saw me. I did not manage to check her as I was annoyed. I am still staying at Kamang’uru and not Meru town as alleged.”
9. PW3 Dr. Kamere Elaine and a dental officer at Meru Level 5 Hospital examined the complainant on 16/7/2014 in order to ascertain her age. The complainant’s first molars were all present in the mouth and fully erupted, the second molars were present and partially erupted while the third molars were all absent. She estimated the complainant’s age to be between 12-13 years and produced the report as PEx. 3.



10. PW4 Corporal Vicky Kirui based at CID Meru South testified that, "I was previously based at Gaitu Patrol Base. I do recall on the 26/12/2012, I reported at the base. Margaret Kinya came to complain that she had reported a case involving her daughter's defilement prior to my arrival. It was P.C Maina investigating the case. He had not recorded witnesses statements. I proceeded to record those statements. I did establish that the complainant had been defiled by the accused, who was living in the same plot with accused. It was at that time, accused's neighbour upon noticing that the complainant had been defiled washed her with a jik detergent. The P3 form had already been filed. I visited the scene and the accused was arrested and charged."
11. On cross examination, she stated that, "I assisted P.C Maina with the investigation owing to the complainant's sex. Yes, I am the one who recorded the statement by the complainant. Yes, she informed me that she was given Ksh. 100/- by the accused. She was unable to quote the correct currency but what I know she was given money. She was in the company of Annita Ngugi in the same house where she was defiled. Yes, Anita confirmed her presence. She did inform me about being given money. She was in the company of Anita Ngugi, and cannot accept any contrary statement. I reported to Gaitu Patrol base after the incident. Yes, the complainant had another defilement case. I don't know the outcome of that case. I found all the medical records concluded. Yes, I recorded statement from Lilian Kangai, but she is not a witness in this case."
12. PW5 JG testified that, "I am a resident of Chaaria area. I am unemployed. I do recall on the 18/9/2012 around 1pm, I was washing my clothes at home. I was called by K who asked me to take her to my kiosk. We went but I slept. My child GN came and informed that K had Kshs. 100/- note. I asked her to get K who I asked for the amount. I asked her where she had removed the money. She informed me that she had picked the money from a place near a store. I asked her to keep the money and hand over to her mother. She again informed me that the money belonged to K. I asked her the whereabouts of K, whom she informed me was sleeping in the house of Guantai. I left and saw K covering herself with a lesso. I called and asked her about the money. She started crying. I begged her to inform me about the source of money. She continued to cry and later revealed that the money had been given to her by Guantai. I was asking of the source as I had also lost my Kshs. 100/- in the morning. They left and went on with my duties. In the evening the mother started making noise claiming that her daughter had been raped by Guantai. We were neighbours with Guantai in the same plot with a stretch of houses. Though accused house is slightly hidden. I did not see accused on that day."
13. On cross examination, she stated that, "I was cleaning clothes at 1pm. Polly Kaimuri is the one who came to me and not the young. She had to collect water. We went with her to my kiosk. I went to relax at the kiosk. My daughter GN is in Form 1. She informed me of seeing K with money. She later changed that the money belonged to K. I asked K who started crying and later revealed that it was government her by Guantai. She had a lesso plus clothes. I did not know any other things and went back to my duties. I was not summoned by the complainant's father. I did not see any act being complained of, but only heard the mother complain about her daughter being raped and cleaned. She was blaming Kangai for washing the complainant. Yes, I know Kajuju and she had a kiosk. It was opened. Kaimuri was alone at the time I saw her come. No Kaimuri was not coming from school. K had bought a donought at Kshs. 5/- and returned Kshs. 95/- from GN, my daughter hence the suspicion about my lost money. Yes, I know accused herein but have never seen on the wrong side of the law."
14. PW6 Dr Paul Wambugu, a medical officer based at Meru Level 5 Hospital produced the complainant's P3 form, PRC form and the treatment notes as exhibits in court. On examination, the complainant, whose clothes were not torn, had tears on the labia majora, minora and cervix. She had no bruises, there was no sign of forced entry and the age of the injury was 1 day post trauma.



15. On cross examination, he stated that, “We had expected tears, bruises and probably semen and none of that was found. There is no evidence of defilement. There is no document herein to confirm that the child was harmed. In the first report from Cottolengo hospital, nothing unusual was detected. The only point noted was that the hymen was not intact, but no blood was on the surface of the vagina. It cannot be stated that the hymen had not been broken on that day.”
16. In his sworn defence, the appellant testified that, “I am a farmer I hail from [Particulars Withheld] in Chaaria. I know PK (PW1). We are not related but we are neighbours. Her mother is MK. We used to stay in the same plot. I recall on 18/9/12 I was at home. At about 5.00 pm I was at home it is not true that I defiled PW1. My house and that of MK (PW2) were very close. We had a good relationship. However there is a time in 2012 when two of my T-shirts got lost from the hanging line when I asked PW2, she said that I had called her a thief she promised that I would know who she is. I think that is the reason she framed me. I never saw PW1 on 18/9/12 at all. I know that she (PW1) had a similar case against a certain man which got finalized in 2013. I have stayed with PW2 until 2015. I was arrested on 19/3/14. There is no day I have never slept in my house. The other case I have talked about involved one Peter Baithumbi Amuri. He was charged in CRC. No. 539/10. PW1 was the complaint accused person was acquitted on 8/3/13 I wish to produce the judgment and proceedings (Marked as D. Exh. 1). The charge is a frame up because it is said that I committed the offence on 18/9/12 whereas I was arrested on 19/3/14 after two years I was at home all through staying with PW2. I suspect that PW2 wanted to hit at me because she thought I had called a suspect with regard to stolen T-shirts.”
17. On cross examination, he stated that, “I did not have any special relationship with PW1. I know one lady called Kangai she was my neighbour. I know she was arrested and charged before Gichthongo Law courts, I heard that she was charged with interfering with evidence. I can’t recall how many neighbours there were in the plot. I used to stay with PW2 I moved out in 2014 after I got arrested. I do not recall if there were male neighbours.”
18. On re-examination, he stated that, “I was arrested together with Kangai by officers from Gaitu Police Station. I did not know why she was arrested I moved out in 2014.”

Analysis and Determination

19. The singular issue for determination is whether the appellant’s acquittal was supported by the evidence adduced.
20. The ingredients of this offence which the prosecution was required to prove beyond reasonable doubt are age, penetration and identity of the perpetrator. PW3 produced the age assessment report where the complainant’s age was estimated to be 12 - 13 years.
21. On penetration, PW6 Dr. Paul Wambugu, stated that when he examined the complainant, he noted that her clothes were not torn, she had tears on the labia majora, minora and cervix but no bruises, there was no sign of forced entry and the age of the injury was 1 day post trauma. He affirmed on cross examination that, “We had expected tears, bruises and probably semen and none of that was found. There is no evidence of defilement. There is no document herein to confirm that the child was harmed. In the first report from Cottolengo hospital, nothing unusual was detected. The only point noted was that the hymen was not intact, but no blood was on the surface of the vagina. It cannot be stated that the hymen had not been broken on that day.”
22. While it is admitted that the complainant and the appellant lived on the same plot, this court is at a loss in reconciling the disconnect between the complainant’s testimony and the medical evidence.



23. The complainant testified that on the material day, she came home from school and after removing her uniform, she went to the toilet. She went on to state that, "...At the time I was coming out was called by Guantai to go for bananas. I went to his house alone. He grabbed me and closed my mouth using a handkerchief. He took me to his bed. He removed my pant. He inserted his urinating organ into my vagina. He started to sleep on me. I felt pain. I started crying. Mama J who was outside started calling him from the door...Mama Jackline came and removed the handkerchief...We went to the house of Mama N together with mama J and K, plus K. K was sent by mama N to go and buy jik...Kaimuri gave the jik to Kangai. I was made to bath in the jik solution together with Ann. I left after being bathed in jik solution. I went back to the house and slept...I bled at the time, Guantai was on top of me. I was first taken to Cottolengo but was not examined. The following day went to Meru General Hospital." On cross examination, she stated that "...I did not have blood stained clothes as he removed them. I had my clothes cleaned by Kangai at the time I was being cleaned. I went to change to other clothes from our house. It was the 1st time, accused was doing that to me. I had been defiled by Peter Baithumbi earlier than that date and no one else. Yes, I have lodged a case against Peter at Nkubu. He had found me at the stream. I was in nursery school...Yes, he penetrated me and I bled. I was walking with difficulties, even at the hospital. The following day I could walk slowly...JG is also named Maman N."
24. PW2 testified that, "...I found PW1 sitted outside the house. I asked her what was wrong with her. She informed me that accused called her while she had gone to the toilet. The toilet is close to the house where accused resides. He enticed her with bananas. He grabbed him into his house before taking her to his bed. He had her mouth covered with a handkerchief. He inserted his private into the private part of my daughter. I took PW1 to Chaaria Police base. I was sent by police to go back and collect all the items used. I was lucky to get the jik which I took the police PW1 was taken to the Cottolengo hospital...I did not check the private parts of the complainant as I was annoyed at the time." On cross examination, she stated that the complainant "was walking with difficulties..She was still bleeding from her private parts. Her clothes had blood which were taken to Cottolengo. Her pant had blood. I was shown by the doctor."
25. PW5's testimony is inadmissible hearsay. She stated that she was informed by her daughter GN that K had a 100 shillings note. When she confronted K about the money, Kamwari told her that the money belonged to the complainant. On enquiring about the whereabouts of the complainant, K "informed me was sleeping in the house of Guantai. I left and saw K covering herself with a lessa. I called and asked her about the money. She started crying. I begged her to inform me about the source of money. She continued to cry and later revealed that the money had been given to her by Guantai."
26. PW4 stated that although Lilian Kangai had recorded her statement, she was not a witness in this case.
27. This court also notes that the said GN, K and Ann were not called to testify. The other crucial witnesses who ought to have been called to testify are mama J who was outside the appellant's door when the alleged offence took place and Kangai who allegedly washed the complainant with jik.
28. There were material contradictions in the evidence adduced by the prosecution witnesses. PW1 stated that PW5 was also known as mama N. She said she was accompanied to the house of mama N by mama J and K. It was mama N who sent K to buy jik. The evidence tendered by PW5 was purely hearsay, and there was no mention of the jik, mama J or K. This court is counseled by *Bukenya and Others v Uganda* [1972] E.A 549, 551, that:

"The prosecution is not required to call a superfluity of witnesses, but if it calls evidence which is barely inadequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that



the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

29. The presence of blood and the walking with difficulty as narrated by PW1 and PW2 were not discernable to PW6 who examined the complainant.
30. This court accepts that where several witnesses testify in a case, there are bound to be contradictions or inconsistencies here and there. In this case however, the pin pointed contradictions cannot be overlooked as they go to the root of the prosecution’s case.
31. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated that:

“As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused. It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”
32. This court finds that the irreconcilable inconsistencies in the prosecution’s case coupled with the absence of medical evidence create a doubt in this court’s mind whose benefit must be construed in favour of the appellant. Invariably, a conviction can be founded even where there is insufficiency of medical evidence provided that the testimony of the complainant is believed to be the truth in terms of section 124 of the *Evidence Act*.
33. This court finds that the appellant’s acquittal was founded on principle and the evidence on record, and is left with a doubt as to whether the charge was fabricated.

Orders

34. Accordingly, for the reasons set out above, this court finds that the appeal is without merit and it is dismissed.
35. The Prosecution has to bear the brunt of failure to effectively prosecute this case to the great injustice of the victim complainant, if the complaint be true.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF FEBRUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Masila for the DPP/ Appellant.

Respondent in Person.

